

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 220

Docket No. NY-0330-10-0223-I-1

**Richard A. Becker,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

November 10, 2010

Richard A. Becker, Coram, New York, pro se.

Aaron J. Fields, Esquire, Brooklyn, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the July 30, 2010 initial decision that denied his request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). For the reasons set forth below, we DENY the petition for review, REOPEN this appeal on our own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant is employed by the agency as a GS-5 Nursing Assistant. He filed an appeal claiming that the agency failed to noncompetitively promote him from the GS-5 level to the GS-6 level when it noncompetitively promoted two other Nursing Assistants and alleging that the agency's failure violated VEOA. Initial Appeal File (IAF), Tab 1. The administrative judge found that the addition of points to a veteran's score because of his status applies only in the open competitive examination process. IAF, Tab 8 (Initial Decision (ID)) at 2. She found that veterans' preference was not applicable to the action that the appellant was appealing, a noncompetitive promotion, where there was no job announcement, and she denied his request for corrective action. ID at 3-4.

¶3 The appellant has filed a petition for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 3.

ANALYSIS

¶4 The Board will grant a petition for review only when significant new evidence is presented or when the administrative judge made an error interpreting a statute or regulation. [5 C.F.R. § 1201.115\(d\)](#). Because the appellant has made no such showing here, we deny his petition for review. We reopen this appeal on our own motion, however, to consider the Board's jurisdiction over this matter. *See Edwards v. Department of State*, [98 M.S.P.R. 481](#), ¶ 4 (2005); [5 C.F.R. § 1201.118](#). The existence of the Board's jurisdiction is a threshold issue in adjudicating an appeal, and the Board may raise the issue of jurisdiction at any time during a Board proceeding. *See Boechler v. Department of the Interior*, [109 M.S.P.R. 619](#), ¶ 16 (2008), *aff'd*, 328 F. App'x 660 (Fed. Cir. 2009). For the reasons set forth below, we find that the administrative judge erred in ruling on the merits of the appellant's VEOA appeal, and we find that the administrative judge should have dismissed the appeal for lack of jurisdiction.

¶5 To establish Board jurisdiction over this appeal, a “right to compete” VEOA claim under [5 U.S.C. § 3330a\(a\)\(1\)\(B\)](#), the appellant must (1) show that he exhausted his remedy with the Department of Labor (DOL) and (2) make nonfrivolous allegations that (i) he is a veteran within the meaning of [5 U.S.C. § 3304\(f\)\(1\)](#), (ii) the actions at issue took place on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act of 2004, and (iii) the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce in violation of 5 U.S.C. § 3304(f)(1). *Styslinger v. Department of the Army*, [105 M.S.P.R. 223](#), ¶ 31 (2007).

¶6 Here, the appellant showed that he had exhausted his remedy with DOL, IAF, Tab 5, and has made nonfrivolous allegations that he is a veteran under the appropriate authority and that the action took place on or after December 10, 2004. However, as the administrative judge correctly noted, there was no job announcement for which the appellant sought a promotion. Under these circumstances, the appellant has failed to show that the agency denied him the right to compete under merit promotion procedures for a vacant position. Thus, he has failed to establish that the Board has jurisdiction over his appeal under VEOA. Accordingly, we dismiss the appeal for lack of jurisdiction.

ORDER

¶7 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.